

SUPREME COURT OF NOVA SCOTIA

Citation: *Markus v. Ryan MacIntosh Landscaping & Construction Services*,
2015 NSSC 295

Date: 20151013

Docket: Halifax No. 440042A

Registry: Halifax

Between:

Joseph Markus

Appellant

v.

Ryan MacIntosh Landscaping & Construction Services

Respondent

Decision

Judge: The Honourable Justice Suzanne M. Hood

Heard: September 29, 2015, in Halifax, Nova Scotia

Counsel: Godfred T. Chongatera, for the Appellant
Ryan MacIntosh, for himself

By the Court:

[1] Joseph Markus appeals from a decision of the Small Claims Court. His Notice of Appeal states that he appeals because of an error of law and failure to follow the requirements of natural justice.

[2] Joseph Markus hired the Respondent (Ryan MacIntosh Landscaping & Construction Services) to paint his house at 5780 Ogilvie Street, an older home he rents to university students.

[3] There was some considerable discussion about the price and scope of work but the adjudicator concluded there was a contract for \$2800. The work was completed but not to the satisfaction of Joseph Markus who believed it was not “properly painted” (quoting from his Notice of Appeal). He did not pay the Respondent, who eventually made a claim in Small Claims Court.

[4] The adjudicator found that there were deficiencies in the work. He said in paras. 32 and 43:

32. Moreover, I also accept, based on the factual testimony of Ms. Peck and the photographs that she took, that there are some areas that could use a paint touch-up. I accept that the photographs accurately depict the problem paint areas at Mr. Markus' property.

...

43. ... I also conclude from the photographic evidence in particular but as well from the oral testimony of Ms. Peck that there are some deficiencies in the work that the Claimant carried out ...

[5] He then went on to consider what damages should be awarded. It is this part of the decision which is the subject of Joseph Markus' appeal.

[6] He noted there was no counterclaim but said with respect to setoff in para.

44:

44. ... but for one issue that I will identify shortly, I would have been inclined to permit a set-off in his favour in respect of any amounts incurred or to be incurred in addressing the painting deficiencies. As noted, however, Mr. Markus did not present any such evidence that would assist in quantifying what it might cost to rectify those deficiencies.

[7] The adjudicator then considered the law with respect to mitigation and in particular the obligation of Joseph Markus to allow the Respondent to remedy the deficiencies. He said in para. 47:

47. As Mr. MacIntosh stated during the hearing before me, if Mr. Markus' complaints (as recorded in Ms. Peck's report and photographs) had been brought to his attention, he could have gone back and addressed them.

[8] He then said Joseph Markus should have given the Respondent that opportunity and since he had not done so, he had failed to mitigate. He said in para.

49:

49. ... I find that this failure forecloses any opportunity that Mr. Markus otherwise might have had to argue for a reduced damage award to the Claimant ...

[9] However, the testimony of the Respondent to which the adjudicator referred is inconsistent with the emails exchanged between the two (Exhibit D1). In an email of September 20, 2014, the Respondent said, “I made sure a thorough job was done ... If we do come across any missed areas we will be sure to touch them up.”

[10] In his later email of September 27, 2014, the Respondent said:

I have thoroughly completed one coat of primer and two coats of finish paint on the whole house including trim and garage. ... My work is complete ... you have 24 hours to provide me with payment of \$2800 ... or first thing Monday morning I will be filing a case with small claims court.

[11] The claim was actually filed on January 12, 2015.

[12] The adjudicator did not deal with the inconsistency between the Respondent’s testimony at trial and the clear intent of his emails that there were no deficiencies and he should be paid in full.

[13] In those circumstances, I conclude he made an error of law in finding that Joseph Markus failed to mitigate because he did not give the Respondent an opportunity to remedy the deficiencies he found existed.

[14] I conclude that in face of the denial by the Respondent that there were deficiencies in his September 27, 2014, email, it was reasonable that Joseph

Markus did not specifically ask the Respondent to remedy deficiencies which he did not agree existed.

[15] As a result of that error of law, Joseph Markus was denied the opportunity to give evidence about the cost to remedy the deficiencies to which the adjudicator referred. These are shown in the photographs in the report of Julie Peck, the home inspector retained by Joseph Markus. (Exhibit D3) and referred to in paras. 22-24 of the decision as follows:

22. Ms. Peck's report and photographs were entered as Exhibit D3. She also testified before me. In her report and testimony, she made note of some "inconsistencies" in the painting job. These "inconsistencies" are detailed in her report which concludes that:

"In my opinion, there are a few areas requiring paint touch up and site clean up, in order for this job to be complete."

23. During cross-examination, Ms. Peck acknowledged that some so-called discoloration could be caused by newer shingles that might appear to be a slightly different colour than older shingles despite the same amount of paint being applied to them. In other words, it is possible that the appearance of observable shading might not necessarily represent a failure to paint a certain part of the house.

24. In redirect, Ms. Peck stated that, in theory, if wood is scraped, primed and painted with two coats, it should look the same despite its age but she nevertheless stated that newer wood will absorb paint at a different rate than older wood and there may well nevertheless be some inconsistencies in the final painted appearance.

[16] They are also referred to in para. 32 (quoted above).

[17] In the result, the appeal is allowed and the issue of setoff only be remitted to the same adjudicator to determine the setoff to be allowed for the deficiencies to which I have referred above.

[18] No costs were sought and none are allowed.

Hood, J.